

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

WESTERN SKY FINANCIAL, LLC,
GREAT SKY FINANCE, LLC,
PAYDAY FINANCIAL, LLC and
MARTIN A. WEBB,

Plaintiffs,

v.

MARYLAND COMMISSIONER OF
FINANCIAL REGULATION,

Defendant.

Civil Action: 1:11-cv-01256-WDQ

**MEMORANDUM IN SUPPORT OF MARYLAND
COMMISSIONER OF FINANCIAL REGULATION'S
MOTION TO DISMISS AMENDED COMPLAINT**

The Maryland Commissioner of Financial Regulation (the "Commissioner"), by and through his undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b), submits the following in support of the Commissioner's Motion to Dismiss the Plaintiff's Amended Complaint for Declaratory Judgment:

INCORPORATION BY REFERENCE

The Commissioner hereby incorporates by reference all arguments previously set forth in the Commissioner of Financial Regulation's Motion to Dismiss (Document 5), the Memorandum in Support of the Commissioner of Financial Regulation's Motion to Dismiss, (Documents 5-1), and the Commissioner's Reply to Plaintiff's Opposition to Defendant's

Motion to Dismiss (Document 8), filed previously in the present matter (Civil Action: 1:11-cv-01256), as if fully reproduced herein. In summary, Plaintiffs' claims in the present declaratory judgment action all fail and should be dismissed pursuant Fed. R. Civ. P. 12(b) based on lack of subject matter jurisdiction and based on the Plaintiffs' failure to state a claim upon which relief may be granted. Additionally, even assuming *arguendo* that this Court did have jurisdiction to entertain the present action (which, in fact, it does not), the case should *still* be dismissed based on the *Younger* abstention doctrine, or based on the Court's broad discretion to decline to exercise jurisdiction over the Plaintiffs' declaratory judgment action.

ADDITIONAL ARGUMENT

The Commissioner submits the following additional arguments in support of its Motion to Dismiss the Amended Complaint:

A. SUPPLEMENT TO ARGUMENTS CONCERNING LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM:

In addition to the Arguments concerning lack of subject matter jurisdiction and failure to state a claim that the Commissioner previously raised in his Motion to Dismiss and Memorandum in Support, as well as in his Reply brief, the Commissioner further notes the following:

1. Other federal and state courts have issued recent decisions in cases involving these same Plaintiffs that support the Commissioner's arguments to dismiss the present matter.

Federal and state courts in Colorado (Exhibits 1 and 2, respectively), a federal court in Missouri (Exhibit 3), and a state court in West Virginia (Exhibits 4), have all issued orders adverse to the Plaintiffs on matters that relate directly to issues raised in the Commissioner's

Motion to Dismiss. These courts have concluded the following: (a). that the Plaintiff business entities were organized under South Dakota law; (b). that the internet-based lending activities of the Plaintiffs constitute off-reservation conduct; and (c).that neither Martin A. Webb, nor the Plaintiff business entities, are entitled to tribal sovereign immunity.

In *State of Colorado v. Western Sky Financial, LLC*, U.S. District Court for the District of Colorado, Case 1:11-cv-00887, the Colorado federal court issued an order on December 27, 2011 remanding a removed action back to Colorado state court (Document 40, at **Exhibit 1**). The Colorado federal court concluded, *inter alia*, that the Plaintiffs' internet-based lending activities involved "off-reservation" conduct. The Colorado federal court stated the following:

Defendants argue that Congress has completely preempted the regulation of Indian affairs on a reservation. However, even if that were so, it begs the question of whether the conduct of which [the State] complain[s] involved regulation of Indian affairs on a reservation. I find and conclude that it did not. [The State] allege[s], and defendants do not dispute, that defendants were operating via the Internet. [] The borrowers do not go the reservation in South Dakota to apply for, negotiate or enter into loans. They apply for loans in Colorado by accessing defendants' website. They repay the loans and pay the financing charges from Colorado; Western Sky is authorized to withdraw the funds electronically from their bank accounts. The impact of the allegedly excessive charges was felt in Colorado. Defendants have not denied that they were doing business in Colorado for jurisdictional purposes, nor does it appear that they could.

(Exhibit 1, Page. 4 of 6).

After the case was remanded, a Colorado state court also concluded that the Plaintiffs' lending activities constituted off-reservation conduct. In *State of Colorado v. Western Sky Financial, LLC and Martin A. Webb*, District Court, Denver County, State of Colorado, Case Number 11CV638, the court issued an Order on April 17, 2012 denying Western Sky/Webb's

Motion to Dismiss (at **Exhibit 2**). The Colorado state court stated, *inter alia*, that, “because Defendants’ alleged conduct does not involve the regulation of Indian affairs on an Indian reservation, the Court finds Defendants’ preemption argument is in vain.” (Exhibit 2, p. 10). The Colorado state court further concluded that the Plaintiffs were not entitled to tribal sovereign immunity: “Webb, as an enrolled member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon Western Sky.” (Exhibit 2, p. 9).

Likewise, in a Memorandum and Order dated March 27, 2012, in which a Missouri federal court remanded a removed action in *State of Missouri v. Webb et al.*, U.S. District Court, Eastern District of Missouri, Case: 4:11-cv-01237 (Document 30, at **Exhibit 3**). the Missouri federal court concluded as follows:

Plaintiff alleges, and Defendants do not dispute, that Defendants operate by way of the Internet. Borrowers do not go to the Reservation to apply for, negotiate, or enter into loans. They apply for loans in Missouri by accessing Defendants’ website. They repay the loans and pay the financing charges from Missouri....

* * *

Defendants’ assertion of “sovereign immunity” requires the Court to consider whether Defendants are tribal entities. Webb, as an enrolled member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon the Lending Companies. *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 171-72 (1977) (holding that the “doctrine of sovereign immunity . . . does not immunize individual members of [a] Tribe.”). Further, as noted above, there is no evidence on the current record that the Lending Companies have applied for tribal entity status under the rules applicable to that process.

In addition, the cases cited by Defendants in support of their assertion of such immunity are inapposite because they involve suits against a tribe or licensed tribal entities.

(Exhibit 3, Pages 3 and 7 of 11). (Emphasis added). The Missouri federal court also noted that the Plaintiffs have not challenged the assertion that the Lending Companies (which include the three Plaintiff business entities named in the present matter), “are South Dakota limited liability companies” and that they “are not, and have not applied to become, sovereign tribal entities.” (Exhibit 3, Page 2 of 11, note 1).

In *State of West Virginia ex rel. McGraw v. Payday Loan Resource Center, LLC, et al.*, Civil Action No. 10-MISC-372, the Circuit Court of Kanawha County, West Virginia issued a Final Order Granting State’s Petition to Enforce Investigative Subpoena on October 24, 2011 (at **Exhibit 4**), stating as follows: “[A]ll of Payday Financial's business activities occurred off the Reservation over the Internet in the individual consumers' home state. See *Zippo [Mfg. Co. v. Zippo Dot Com, Inc.]*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997)] []. Furthermore, Payday Financial's customers are non-tribal members who are residents of states.” (Exhibit 4, p. 6, ¶ 3).

The West Virginia court further stated the following:

[T]he Internet payday loans made by Payday Financial to West Virginia consumers were made and to be performed in West Virginia, not on the Reservation. The undisputed testimony shows that Payday Financial intentionally reached out beyond the Reservation to conduct business with West Virginia residents and just because the business was conducted over the Internet is of no consequence. [] In the present action, Payday Financial was clearly doing business over the Internet by entering into contracts with West Virginia residents off the reservation that involved the knowing and repeated transmission of computer files over the Internet.

(Exhibit 4, pp. 8-9, ¶ 2).

The West Virginia state court also decided, just as the Colorado state court and the Missouri federal court later concluded (as discussed above), that the Plaintiffs were not entitled to tribal sovereign immunity:

The Court further concludes that Payday Financial, LLC, is not a federally recognized Indian tribe and is not a tribal entity or an arm of the Cheyenne River Sioux Tribe or any other Indian tribe. Payday Financial, LLC, is a corporate entity organized under the laws of South Dakota. Therefore, based upon the foregoing Discussion, Payday Financial, LLC, is not entitled to tribal sovereign immunity or tribal immunity, and as such, has not presented a lawful excuse for its failure to comply with the State's Subpoena.

(Exhibit 4, pp. 9-10, ¶ 2).¹

In addition to the arguments previously raised in the Commissioner's Motion to Dismiss, Memorandum in Support, and Reply brief, the federal and state court decisions referenced above further support the Commissioner's arguments that the present matter should be dismissed based on lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. It is evident that the Plaintiffs' internet-based lending activities are essentially the same nation-wide, and thus court decisions applicable to Plaintiffs' activities in Colorado, Missouri, and West Virginia would equally apply to Plaintiffs' activities in Maryland. Based on the foregoing, it would be appropriate to dismiss the present action in its entirety at the present time, without the need for engaging in discovery.

¹ Payday Financial, LLC filed a Verified Petition for Writ of Prohibition to the Supreme Court of Appeals of West Virginia on November 21 2011, requesting that the Supreme Court of Appeals reverse the judgment of the Circuit Court and dismiss the State's Petition to Enforce Investigative Subpoena. (Excerpt of Petition and Joint Appendix provided at **Exhibit 5**). The Supreme Court of Appeals issued an Order on February 9, 2012 denying the petition (*see Exhibit 6*); the order stated that, "the Court is of opinion that a rule should not be awarded, and the writ prayed for by the petition is hereby refused."

2. Even if the declaratory judgment action is not dismissed in its entirety based on lack of subject matter jurisdiction and failure to state a claim, the Plaintiff business entities should still be dismissed at the present time.

The Plaintiff business entities should be dismissed from the present declaratory judgment action based on lack of jurisdiction and failure to state a claim upon which relief may be granted. The federal and state court decisions referenced above, as well as Documents 10-7 through 10-9 that were filed in the related federal action that this Court previously remanded (Civil Action: 1:11-cv-00735), make clear that all three of the Respondent business entities were organized under the laws of the State of South Dakota. Pursuant to South Dakota's Uniform Limited Liability Company Act, "[a] limited liability company is a legal entity distinct from its members." (S.D. Codified Laws § 47-34A-201.)

Therefore, since LLCs organized under South Dakota law, such as the Plaintiff business entities, are considered legal entities distinct from their owners (*i.e.*, members), the Plaintiff business entities cannot be considered members of the Cheyenne River Sioux Tribe based on Plaintiff Webb's purported tribal membership. *See Baraga Prods., Inc. v. Comm'r of Revenue*, 156 F.3d 1228 (table), 1998 WL 449674, *2 (6th Cir. 1998), as cited by this Court in its Memorandum Opinion issued on April 9, 2012 in the present action (Document 17, pp. 9-11). As such, the Plaintiff business entities should be dismissed from the present matter based on lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

B. SUPPLEMENT TO ARGUMENTS CONCERNING *YOUNGER* ABSTENTION:

In addition to the Arguments concerning *Younger* Abstention that the Commissioner previously raised in his Motion to Dismiss and Memorandum in Support, as well as in his Reply brief, the Commissioner further notes the following:

With regard to the first prong of the *Younger* test: After the removed action (Case 1:11-cv-00735-WDQ) was remanded by this Court back to the Commissioner on October 12, 2011, the Commissioner subsequently delegated the case to the Maryland Office of Administrative Hearings (“OAH”) to hold a hearing and to issue proposed findings of fact, conclusions of law, and a proposed decision (collectively, “proposed decision”), as well as to address the Respondents’ Motion to Dismiss (which this Court had remanded back with the underlying administrative action). See the Commissioner’s delegation letter of November 7, 2011, at **Exhibit 7**. OAH subsequently held a full hearing on this matter on January 31 and February 1, 2012, and the parties subsequently filed written closing briefs; OAH’s proposed decision is due back to the Office of the Commissioner of Financial Regulation (“OCFR”) during the first week of July 2012. See Transcript excerpt, at **Exhibit 8**. Given that this administrative hearing pertained to the Commissioner’s original Summary Order of February 15, 2011, which was the genesis of all of the litigation in this matter, there is clearly an ongoing state proceeding that was instituted prior to any substantial progress in the present federal declaratory judgment action, thereby satisfying the first prong of the *Younger* test.

With regard to the third prong of the *Younger* test: The Administrative Law Judge (“ALJ”) at the OAH hearing made clear that her proposed decision would include a ruling on the Plaintiff’s Motion to Dismiss (previously filed in the removed/remanded case, Case 1:11-

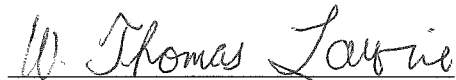
cv-00735-WDQ, at Document 4, and which is based on the Plaintiffs' claims of tribal sovereign immunity). (See Transcript excerpt (Exhibit 6), p. 8, line 16 through p. 9, line 2). Thus, the Plaintiffs clearly have had an adequate opportunity to raise the federal constitutional claims of tribal sovereign immunity that have been advanced in the present declaratory judgment action. The Plaintiffs will also have the opportunity to raise all of their constitutional defenses, including their defense of tribal sovereign immunity, not only at the State administrative hearing, but also in any subsequent judicial review or appeal of the Agency's final order in this administrative action (as discussed in the Commissioner's Motion to Dismiss, Memorandum in Support, and Reply brief, previously filed in the present action). Accordingly, the Plaintiffs will have a full and fair opportunity to litigate their constitutional claims, thereby satisfying the third prong of the *Younger* test.

Based on the foregoing, as well as on the arguments set forth in the Commissioner's previously-filed Motion to Dismiss and Memorandum in Support (Documents 5 and 5-1, respectively), and in the Commissioner's Reply brief (Document 8), all three prongs of the *Younger* test are fully satisfied in the present matter, and this Court should invoke the "mandatory rule of equitable restraint" and dismiss the present action.

CONCLUSION

For the reasons stated herein, as well as for those set forth in the Commissioner's Motion to Dismiss and Memorandum in Support (Documents 5 and 5-1, respectively), and in the Commissioner's Reply brief (Document 8), the Maryland Commissioner of Financial Regulation respectfully requests that this Court dismiss the present action with prejudice.

DOUGLAS F. GANSLER
Attorney General of the State of Maryland

A handwritten signature in cursive script that reads "W. Thomas Lawrie". The signature is written in black ink and is positioned above a horizontal line.

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